**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

**EUGENE EDWARD BROWN, III,**

**Petitioner,**

**v.** **CASE NO. 18-3118-SAC**

**KANSAS DEPARTMENT OF CORRECTIONS, et al.,**

**Respondents.**

**MEMORANDUM AND ORDER OF DISMISSAL**

This matter comes before the Court on a motion to dismiss filed by respondents Kansas Department of Corrections (KDOC), Norwood, and Cline (ECF No. 14). Petitioner filed a response (ECF No. 16), and Respondents have filed a reply (ECF No. 17).

**Background**

Petitioner is a state prisoner confined at Lansing Correctional Facility. He is serving a 50-month sentence for aggravated battery causing great bodily harm while driving under the influence. Petitioner's projected release date is March 20, 2019. He challenges the denial of his application for early release pursuant to the Community Parenting Release Program, K.S.A. 22-3730. Mr. Brown claims that he qualified for home detention under the statute but was unlawfully denied release pursuant to a KDOC policy (Internal Management Policy and Procedure (IMPP) 11-126A), which he alleges is inconsistent with the statute. Mr. Brown asserts jurisdiction under

K.S.A. 60-1501; the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq.; 28 U.S.C. § 1331; 28 U.S.C. § 1361; 28 U.S.C. § 1651; and 5 U.S.C. § 702.

Respondents seek dismissal of this action on the grounds that: (1) K.S.A. 60-1501 does not provide a basis for federal jurisdiction; (2) Mr. Brown's claims are barred because he failed to exhaust his state court remedies; (3) his claims are barred by Eleventh Amendment immunity; (4) his claims are unmeritorious and are barred by qualified immunity; and (5) he fails to allege personal participation by Defendant Norwood in any alleged civil rights violation.

## Discussion

### Nature of this Action

Petitioner styled this action as a petition for writ of habeas corpus under K.S.A. 60-1501. K.S.A. 60-1501 is the Kansas statute providing for habeas corpus review in state court and does not present a federal question such as to provide this Court with jurisdiction under 28 U.S.C. § 1331, which Petitioner also invokes ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Petitioner also references the federal Administrative Procedure Act, 5 U.S.C. §§ 551, et seq., which is inapplicable as Petitioner complains of the actions of a *state* agency; 28 U.S.C. § 1361, which provides the Court with jurisdiction over mandamus actions against *federal* agencies and officials; and 28 U.S.C. § 1651, which authorizes the issuance of writs. Finally, Mr. Brown attempts to bring a claim under 42 U.S.C. § 1983.

However, the relief Petitioner requests is an injunction against KDOC ordering his immediate release on house arrest (and attorney fees). Because Mr. Brown is seeking a speedier release from imprisonment, his proper remedy is a petition for writ of habeas corpus. "Habeas

corpus is the *only* avenue for a challenge to the fact or duration of confinement, at least when the remedy requested would result in the prisoner's immediate or speedier release." *Boutwell v. Keating*, 399 F.3d 1203, 1209 (10th Cir. 2005) (emphasis added). When the legality of a confinement is challenged so that the remedy would be release or a speedier release, the case *must* be filed as a habeas corpus proceeding rather than under 42 U.S.C. § 1983. *Heck v. Humphrey*, 512 U.S. 477, 482 (1994) (emphasis added). "[A] § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, *but not to the fact or length of his custody.*" *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (emphasis added). Therefore, Mr. Brown's action in its entirety is properly construed as a habeas corpus action pursuant to 28 U.S.C. § 2241.[1]

**Failure to Exhaust**

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see Woodford v. Ngo*, 548 U.S. 81, 92 (2006); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). 28 U.S.C. § 2254(b)(1) provides that "an application for a writ of habeas corpus on behalf of a person in custody pursuant to a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." Although 28 U.S.C. § 2241 does not contain an explicit exhaustion requirement, exhaustion of available remedies is

[1] Because Mr. Brown challenges the execution of his sentence, rather than the validity of his conviction, his claim properly falls under 28 U.S.C. § 2241. *See Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir. 2011) (stating that petition under § 2241 attacks the execution of a sentence rather than its validity).

required for petitions brought under § 2241. *Montez v. McKinna*, 208 F.3d 862, 866 (10th Cir. 2000) ("A habeas petitioner is generally required to exhaust state remedies whether his action is brought under § 2241 or § 2254."); *see also Wilson v. Jones*, 430 F.3d 1113, 1118 (10th Cir. 2005) (noting habeas petitioner seeking relief under 28 U.S.C. § 2241 is required to first exhaust available state remedies, absent showing of futility). "The exhaustion of state remedies includes both administrative and state court remedies." *Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002). The petitioner bears the burden of showing he has exhausted available state remedies. *Olson v. McKune*, 9 F.3d 95, 95 (10th Cir. 1993); *see also Cooper v. McKinna*, No. 99-1437, 2000 WL 123753, at *1 (10th Cir. Feb. 2, 2000); *Clonce v. Presley*, 640 F.2d 271, 273 (10th Cir. 1981); *Bond v. Oklahoma*, 546 F.2d 1369, 1377 (10th Cir. 1976).

A petitioner may satisfy the exhaustion requirement by showing either (1) "that a state appellate court has had the opportunity to rule on the same claim presented in federal court," or (2) "that at the time he filed his federal petition, he had no available state avenue of redress." *Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992); *see also Bear v. Boone*, 173 F.3d 782, 785 (10th Cir. 1999) ("In order to fully exhaust state court remedies, a state's highest court must have had the opportunity to review the claim raised in the federal habeas petition.").

Mr. Brown gives no indication that he has presented his claim to any state court. Mr. Brown does not allege that there is no state remedy available to address his claims, and this Court cannot rule out the possibility that the Kansas courts would entertain Mr. Brown's claim. Thus, it is appropriate that this petition be dismissed without prejudice to allow Mr. Brown to exhaust his state remedies.[2] *See Anderson v. Bruce*, 28 F. App'x 786, 788 (10th Cir. 2001).

[2] Respondents also seek dismissal on grounds that Petitioner's claims are barred by Eleventh Amendment immunity and qualified immunity and his failure to allege personal participation by Defendant Norwood. The Court need not address these arguments because dismissal is appropriate on other grounds.

**No Constitutional Right to Early Release**

Even if Mr. Brown had properly exhausted his state remedies before filing this action, his claim that he is constitutionally entitled to early release has no merit. Mr. Brown does not have a constitutionally protected right to be conditionally released before the expiration of a valid sentence. *Greenholtz v. Inmates of Neb. Penal and Corr. Complex,* 442 U.S. 1, 7 (1979); *see also Gilmore v. Kansas Parole Board,* 756 P.2d 410, 415 (Kan. 1988), *cert. denied* 488 U.S. 930 (a prisoner has no protected legal right to parole from a criminal sentence). Nor does K.S.A. 22-2730 create a constitutionally protected liberty interest requiring procedural due process. The statute states only that "[t]he Secretary of Corrections may transfer an offender from a correctional facility to home detention in the community if the Secretary determines that community parenting release is an appropriate placement." K.S.A. 22-2730. The language of the statute is not mandatory. A statute that allows a decisionmaker discretion to deny the requested relief does not create a constitutionally recognized liberty interest. *See Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). The denial of early release does not itself result in unlawful detention; rather, Mr. Brown simply must continue to serve a lawfully imposed term of incarceration. *See Parks v. Kansas Prisoner Review Bd.*, 337 P.3d 73 (Table), 2014 WL 5801346, *1 (Kan. App. 2014) (reaching this conclusion in the context of denial of parole).

**Claim of State Law Violation**

In addition to claiming a constitutional right to early release, Mr. Brown alleges Respondents violated state law in failing to allow him to serve the remainder of his sentence in home detention. Even if he had met the exhaustion requirement, Mr. Brown's claim of a violation of Kansas law is not cognizable in a federal habeas action. *Montez*, 208 F.3d at 865.

## Conclusion

For the reasons set forth above, the Court grants Respondents' motion to dismiss.

**IT IS THEREFORE ORDERED** Respondents' motion to dismiss (ECF Doc. 14), is **granted**. This matter is dismissed without prejudice.

**IT IS SO ORDERED.**

DATED: This 27th day of November, 2018, at Topeka, Kansas.

**s/ Sam A. Crow**
**SAM A. CROW**
**U.S. Senior District Judge**